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No. 85-455

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

POLO FASHIONS, INC.,

Petitioner,

V.

STOCK BUYERS INTERNATIONAL, INC., COLUMBUS BUSINESS SYSTEMS, INC., EUGENE SERGIO, and MORTON LADOWITZ,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PRELIMINARY STATEMENT

Petitioner Polo Fashions, Inc. ("Polo") submits this Supplemental Brief in support of its application for a writ of certiorari, in order to respond to issues raised in the Amicus Curiae Brief filed by the Solicitor General ("*Polo* Amicus Brief"), and to identify important distinctions between the issues raised in this case and those that were recently presented to the Court in *Young v. United States ex rel. Vuitton et Fils S.A., cert. granted,* 106 S. Ct. 3270 (1986), *argued,* Jan. 13, 1987.

ARGUMENT

I. Polo Has Standing to Petition for a Writ of Certiorari.

At the conclusion of its Amicus Brief in support of the granting of a writ of certiorari, the Solicitor General stated that there is a "substantial question" concerning the standing of Polo to seek review of the judgment below. *Polo* Amicus Brief at 16. Despite the reservations expressed by the Solicitor General, Polo undoubtedly has standing to petition for a writ of certiorari to the Sixth Circuit.

In an ordinary criminal proceeding, of course, a private party has no standing to pursue a criminal appeal on behalf of the prosecution because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Diamond v. Charles*, 106 S. Ct. 1697, 1704 (1986) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). Polo does not dispute this general rule. The rule, however, simply has no application to this case. Polo's counsel was specifically appointed by the District Court pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure to prosecute the respondents for criminal contempt. Polo is prosecuting this appeal to vindicate the authority of the District Court, and thus is not seeking to pursue unilaterally a criminal appeal in furtherance of its private interests. If the District Court possessed authority to appoint Polo's counsel to prosecute the respondents, as Polo contends, it would be illogical to conclude that Polo's counsel may not defend the judgment of the District Court on appeal and before this Court.

The Solictor General has cited no authority supporting such an anomalous result. Instead he has relied on a number of irrelevant opinions which do not support this proposition in the least. In both *In re Lahm Industries, Inc.*, 609 F.2d 567 (1st Cir. 1979) and *Kienle v. Jewel Tea Co.*, 222 F.2d 98 (7th Cir. 1955), the courts dismissed appeals on standing grounds because the party seeking criminal contempt sanctions had never been appointed as a prosecutor under Rule 42(b). *See Musidor, B.V. v. Great American Screen*, 658 F.2d 60, 64 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982). The other cases cited by the Solicitor General, *Ramos Colon v. United States*

Attorney, 576 F.2d 1 (1st Cir. 1978) and *United States v. McKenzie,* 735 F.2d 907 (5th Cir. 1984), held only that private parties had no standing to appeal the district court's *refusal* to pursue criminal contempt proceedings. Since the attorneys' authority derived from the district court, when the court indicated it did not want to pursue contempt proceeding, the attorneys' authority was terminated. *Ramos Colon,* 576 F.2d at 5; *McKenzie,* 735 F.2d at 911-12. Here, of course, Polo secured the necessary Rule 42(b) order to prosecute this proceeding, and the District Court entered judgments of conviction against the respondents. Unlike the appellants in *Colon* and *McKenzie,* Polo's counsel are still acting pursuant to their authority as the representative of the District Court. In this context, the Solicitor General's reliance upon these cases to suggest a standing issue is misplaced. Clearly, Polo has standing to petition for a writ of certiorari as the District Court's duly appointed representative pursuant to Rule 42(b).

II. Appointment of Counsel for an Interested Party Is Proper Where the Defendant Will Only Be Prosecuted for a Non-Serious Criminal Contempt.

The Solicitor General argues that the rule adopted by the Sixth Circuit was permissible because, in part, it comports with decisions of this Court which regard contempts as crimes in the ordinary sense for the purpose of defining defendants' rights. *Polo* Amicus Brief at 10. His discussion, however, ignores the fact that the instant case is *not* one where the defendants were prosecuted for a *serious* crime. Because the sale of counterfeit goods is a crime in Ohio,[1] the contempt procedures were conducted pursuant to 18 U.S.C. § 402, which imposes a maximum term of imprisonment of six months.[2] Thus, the

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[1] *See* Ohio Rev. Code Ann. § 2913.32 (Anderson 1982).

[2] 18 U.S.C. § 402 is applicable to contempt proceedings if the act which is the subject of the proceeding is also a criminal offense under the laws of the United States or any state.

respondents were only prosecuted for non-serious contempt. *See Cheff v. Schnackenberg,* 384 U.S. 373, 379-80 (1966) (proceeding is for non-serious contempt where maximum penalty is for not more than six months).

This Court has recognized the important distinction between serious and non-serious contempt in terms of the rights afforded to defendants. Defendants in non-serious contempt proceedings are not afforded the same procedural protection as those charged with serious contempts. *Compare Bloom v. Illinois,* 391 U.S. 194, 198 (1968) (the constitution mandates jury trials for all serious contempt proceedings) *with Cheff,* 384 U.S. at 380 (no constitutional right to jury trial for criminal contempt where the maximum penalty is only six months, but the Court held under its supervisory powers that contempt sentences of more than six months may not be imposed without a jury trial). *See also Muniz v. Hoffman,* 422 U.S. 454, 475-76 (1975).

Indeed, one of the important distinctions between the issues presented in this case and those in *Vuitton* is that in the latter case the defendants were prosecuted as serious contemnors pursuant to 18 U.S.C. § 401 and received prison sentences of up to five years. *United States ex rel. Vuitton et Fils S.A. v. Klayminc,* 780 F.2d 179, 180 (2d Cir. 1985). Thus, consistent with *Bloom* and *Cheff,* the respondents have a substantially weaker claim than the defendants in *Vuitton* to have disinterested attorneys act as prosecutors in their contempt proceedings. The Solicitor General apparently recognizes this distinction in his Amicus Curiae Brief submitted in *Vuitton* ("*Vuitton* Amicus Brief"):

> [the] characterization of the contempt sanction [as a crime] suggests the appropriateness of a supervisory rule *that requires a disinterested prosecutor in cases of serious contempt.*

Vuitton Amicus Brief at 24 (emphasis added). The implication is that in cases of non-serious contempt a requirement of a disinterested prosecutor would not necessarily be appropriate. This only emphasizes the need for this Court to issue a writ of certiorari so that it can determine whether the Sixth Circuit

properly exercised its supervisory power when it prohibited the District Court from appointing counsel for an interested party to prosecute a non-serious contempt. The question of whether different standards should apply to contempts pursuant to 18 U.S.C. § 402 than those brought under 18 U.S.C. § 401 is an important one because many if not most acts of criminal contempt also constitute violations of state or federal law.

III. In the Absence of Any Showing of Prejudice to Respondents by Virtue of the Appointment of Private Counsel Reversal of the Convictions Is Not an Appropriate Remedy.

In supporting the propriety of the Sixth Circuit's broad exercise of its supervisory power, the Solicitor General ignores the fact that the Sixth Circuit reversed criminal convictions in violation of specific limits this Court has established for this drastic remedy. *See United States v. Hasting,* 461 U.S. 499, 506-07 (1983); *United States v. Payner,* 447 U.S. 727, 734 (1980). Even if the District Court committed error in appointing Polo's counsel, in the absence of any showing of prejudice to respondents based upon their prosecution of the criminal contempt proceedings the convictions must be sustained. *Cf. Rose v. Clark,* 106 S. Ct. 3101, 3106-07 (1986).

In *Hasting* the Seventh Circuit reversed a conviction on the basis of prosecutorial misconduct, without considering whether the error was prejudicial. 461 U.S. at 503. This Court reversed and admonished federal courts to approach the exercise of supervisory powers "with some caution" and to refrain from reversing convictions where there is no reasonable likelihood that the practice complained of contributed to the conviction and where the purported violation was remediable by less drastic measures. *Id.* at 506-07. *See* Fed. R. Crim. P. 52(a).

Under this standard, respondents convictions should have been affirmed. The Sixth Circuit found no actual prejudice from Polo's counsels' participation in this case. Indeed, re-

spondents have never even asserted such prejudice as a basis for reversing their convictions.[3] Instead, although the evidence of the respondents guilt was overwhelming, the Sixth Circuit relied upon general ethical constraints on public prosecutors to reverse the convictions. *Polo Fashions v. Stock Buyers International, Inc.*, 760 F.2d 698, 704-05 (6th Cir. 1985).[4]

Moreover, the Sixth Circuit's interests in promulgating a supervisory rule, assuming such a rule were appropriate, may be satisfied by far less drastic means than the reversal of these convictions. The court could simply have announced a prospective rule and then reviewed this case to ascertain, if such a claim had been asserted, whether actual prejudice had resulted from the Rule 42(b) appointment. *See United States v. Florea*, 541 F.2d 568, 571-72 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). In the absence of either a claim or finding of prejudice to respondents, and in light of the availability of less drastic means to prohibit the appointment of counsel for interested parties to prosecute contempt proceedings, the Sixth Circuit was precluded from invoking its supervisory powers to reverse respondents' convictions. *Hasting*, 461 U.S. at 506-07; *Payner*, 447 U.S. at 734-35.

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[3] In *Vuitton*, on the other hand, petitioners claimed they suffered actual prejudice from the appointment of the private prosecutor. Brief for Petitioners on Writs of Certiorari to the United States Court of Appeals for the Second Circuit at 31-32.

[4] The Sixth Circuit's reliance upon these ethical constraints also was misplaced, because the limited role of Polo's counsel was not comparable to the broad powers exercised by a public prosecutor. The "prosecutorial decision" in this case was made by the District Court, and Polo's counsel did not assume any of the public prosecutor's discretionary responsibilities. *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). They simply presented evidence of a completed contempt to an impartial jury. This limited function does not implicate any of the concerns supporting the presence of a disinterested prosecutor in a standard criminal prosecution. Thus, the general ethical constraints upon public prosecutors do not support the Sixth Circuit's decision in this case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari previously filed with this Court, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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